83-1165

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. _____

CAPITOL CITY
LUMBER COMPANY, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

By: Thomas A. Bengtson

Business Address:

1900 Michigan National Tower
Lansing, Michigan 48933
Telehone: (517) 485-7176

APPENDICES B and C

APPENDIX B

DECISION OF THE NLRB
AUGUST 30, 1982

263 NLRB No. 102

D--9163
Lansing, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAPITOL CITY
LUMBER COMPANY

and

Case 7--CA--18029

LOCAL NO. 580,
INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF
AMERICA

DECISION AND ORDER

On August 5, 1981, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter,

Respondent filed exceptions and a supporting brief and, later, filed a motion to reopen the record.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Although we agree with the Administrative Law Judge that Respondent

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[1]We hereby deny Respondent's motion, as the evidence that it seeks to adduce is not newly discovered or previously unavailable, nor would it require a different result. See Sec. 102.48(d)(1), National Labor Relations Board Rules and Regulations, Series 8, as amended.

violated Section 8(a)(5) and (1) of the Act by refusing to make welfare and pension plan contributions as required by its collective-bargaining agreement with the Union, we do so only for the reasons that follow.

The facts of the case are basically undisputed.

In spring of 1979,[2] Respondent and the Union began negotiating for a successor collective-bargaining agreement. The Union was represented by its recording secretary, James Cooper, and two shop stewards. Respondent was represented by its president, James Olson, its vice president, and its attorney. Soon after negotiations began, Olson left on a trip to Georgia, where he suffered the first of a series of heart attacks. Contract

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[2]All dates herein are in 1979, unless otherwise indicated.

negotiations continued while Olson was hospitalized in Georgia, and he was kept informed regarding the progress of the negotiations. On May 7, the unit employees began an economic strike in support of the Union's contract demands. On May 25, Respondent and the Union reached complete agreement on the terms of a new contract.

Since Respondent was unwilling to enter into a contract of more than 1 year in duration, the contract was effective from May 1, 1979, through April 30, 1980, and then ''from year to year thereafter unless written notice of desire to cancel or terminate the agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.'' Cooper explained to Respondent's negotiators that participation in the Michigan Conference of Teamsters Welfare Fund and the Central States, Southeast and Southwest Areas

Pension Fund required a 3-year commitment with those funds. Article XIX of the contract, consequently, provided for Respondent to make weekly contributions per employee to the welfare fund as follows:

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

It similarly provided for Respondent to make weekly contributions per employee to the pension fund as follows:

$21 effective May 1, 1979
$24 effective May 1, 1980
$31 effective May 1, 1981

The unit employees ratified the contract and returned to work on May 26. Although Olson had returned from Georgia on May 14, the Union delayed in obtaining his signature on the contract because he was still very ill. On December 14, Cooper finally met with Olson in order to sign the contract. Cooper and Olson each testified that Olson indicated misgivings about the

3-year commitment to the two funds. Cooper testified that Olson expressed concern about whether the employees would realize that Respondent would be incurring costs in the future regarding fund contributions. Cooper also testified that he drafted a letter of understanding in response to Olson's concern. Olson, in contrast, testified that he could not recall ever indicating to Cooper that he was interested in informing the employees of the costs of the fund contributions. Olson maintained that he was concerned instead about a 3-year commitment in a contract which he thought would be for only 1 year. He further testified that he believed that the letter of understanding ''clarified the situation.'' The Administrative Law Judge credited Cooper's testimony over that of Olson concerning what transpired during their conversation. We have examined the

record and find that his credibility resolutions are supported by a preponderance of the evidence. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

The letter of understanding, prepared by Cooper, read as follows:

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67-1/2) per hour providing forty-five cents (45 cents) per hour applied to wages and the remaining twenty-two and one half cents (22-1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from May 1, 1979 through April 30, 1980.
>
> In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the costs from the money package negotiated in future negotiations.

On December 28, Cooper and Olson signed the letter of understanding, the contract,

and the agreements for participation in the two funds. The following was typed onto each participation agreement: ''The letter of understanding between Capitol City Lumber Company and Teamsters Chauffeurs of Local Union No. 580 dated December 14, 1979 (attached) shall become a part of this agreement.''

Respondent apparently contributed the proper amounts to each fund, pursuant to the first step of article XIX and the fund participation agreements, for the period from May 1, 1979, through March 30, 1980. The essence of the dispute in this case involves Respondent's obligation for contributions after that date.

By letter dated February 29, 1980, the Union sought to reopen the contract for negotiations. The Union's notice was untimely, however, since it was sent less than 60 days prior to the expiration date

of the contract. The Union requested negotiations, but Respondent refused to waive its rights and consequently there were no negotiations. By its own terms, therefore, the contract continued in effect for another year, until May 1, 1981. During this second year of the contract, however, Respondent continued to make the same contributions to funds, i.e., those required by the first step of the contract and the participation agreements.[3] The record indicates that the contract subsequently terminated, presumably on April 30, 1981. Respondent ceased making contributions as of that date.

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[3]Actually, Respondent had not paid a portion of the amount that it owed to the pension fund due to a billing error by that fund. Prior to the hearing, Respondent and the Union entered into an agreement whereby Respondent agreed to remit the amount that it owed upon receiving a correct billing from the fund.

Respondent contends that it fulfilled its obligation, as set forth in the collective-bargaining agreement, to make welfare fund and pension fund contributions. Respondent maintains that it signed a collective-bargaining agreement which was effective for 1 year. It claims that Olson objected to the 3-year commitment contained in article XIX when he first saw the contract, and that the letter of understanding was drafted to resolve the ''ambiguity'' created by article XIX. Respondent also claims that article XIX was left unchanged as an accommodation to the Union. Consequently, Respondent argues that the letter of understanding nullifies the three-step progression of contributions contained in article XIX and the funds' participation agreements. In particular, Respondent relies upon the second paragraph of the

letter which states that the total costs of the contract's ''money package'' to Respondent is 67-1/2 cents per hour, per employee. Additionally, Respondent relies upon the last paragraph of the letter, which states:

> In order to maintain the health and welfare, and pension funds from May 1, 1980, it will be necessary to deduct the cost from the money package negotiated in future negotiations.

Since the contract automatically renewed itself for an additional year when the Union did not file a timely notice to reopen it, Respondent concludes that it was obligated to make fund contributions for that additional year only, and at the same first-step rate.

We disagree with Respondent's contentions. In article XIX, Respondent clearly assumed a 3-year commitment to the funds which survived the expiration of the contract. The evidence indicates that this

commitment was negotiated to meet the requirements of the funds, and, indeed, Respondent even acknowledges this. The letter of understanding, as part of the contract, must be construed in a manner that is consisent [sic] with the rest of the contract. On its face, the letter does not purport to nullify article XIX. In fact, the first paragraph of the letter appears to reiterate article XIX,[4] stating that:

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[4] We note that the letter and the contract were signed simultaneously. This too tends to indicate that the first paragraph of the letter affirms the obligations set forth in art. XIX. Respondent's contentions that the letter of understanding modifies art. XIX would be more persuasive if the letter had been drafted and signed after the parties had entered into the contract.

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.

Further, Respondent's reliance upon the other two paragraphs of the letter is misplaced. These paragraphs set forth certain hourly per-employee costs to Respondent, and mention that fund contributions will be taken into account in future negotiations. As indicated by Cooper's credited testimony, the letter of understanding was drafted in response to Olson's concern about informing the employees of the entire cost of the collective-bargaining agreement. This is entirely consistent with the plain wording of article XIX.

In conclusion, Respondent is contractually obligated to continue contributing to the funds in accordance

with the second and third steps of article XIX, notwithstanding the expiration of the rest of the contract, and the letter of understanding reiterates this 36-month obligation. By failing and refusing to make these contributions, Respondent invaded the Union's ''statutory right as a collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees''in violation of Section 8(a)(5) and (1) of the Act.[5]

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[5] C & C Plywood Corporation, 148 NLRB 414, 415 (1964), affd. 385 U.S. 421 (1967), reversing 351 F.2d 224 (9th Cir. 1965).

Member Hunter finds it unnecessary to address the concerns raised by the concurrence, since all members agree that there is a violation of the Act in the instant case.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truck drivers, and yard employees employeed [sic] by Capitol City Lumber Company at or out of its facility located at 700 E. Kalamazoo St., Lansing, Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors, as defined in the Act, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.[6]

4. At all times material herein, the Union has been and is the exclusive collective-bargaining representative of the employees in the unit described above.

5. By failing and refusing to make welfare and pension fund contributions as required by its collective-bargaining agreement with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[6]The unit description that appears in the Administrative Law Judge's Decision is incorrect.

The Remedy

Having found that Respondent has engaged in unfair labor practices, we shall order Respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that Respondent make its employees whole by paying all welfare and pension fund contributions, as set forth in article XIX of the collective-bargaining agreement, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments.[7]

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[7]Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a ''make-whole'' remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined,

Additionally, in the event that either fund has canceled coverage, we shall order Respondent to reimburse the unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation.[8]

(cont.)
depending upon the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs. etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213, 1216 at fn. 7 (1979).

[8]Any and all issues regarding the cancellation of covergae [sic] are reserved to the compliance stage. Any interest which is payable shall be computed in the manner and amount prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Member Jenkins would require any interest payable to employees to be computed in the manner set forth in his partial dissent in Olympic Medical Corporation, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Capitol City Lumber Company, Lansing, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of its collective bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which contract covers employees in the following unit:

> All full-time and regular part-time truck drivers, and yard employees employed by Capitol City Lumber Company at or out of its facility located at 700 E. Kalamazoo St., Lansing, Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make the contributions which it failed to remit to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of its collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, for the employees in the above-described unit.

(b) In the event that either fund has canceled coverage, reimburse the unit employees with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation, as set forth in the section of this Decision entitled ''The Remedy.''

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due.

(d) Post at its Lansing, Michigan, place of business copies of the attached

notice marked ''Appendix.''[9] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days

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[9]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

from the date of this Order, what steps Respondent taken to comply herewith.

Dated, Washington, D.C.

August 30, 1982

Howard Jenkins, Jr.
Member

Robert P. Hunter
Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

CHAIRMAN VAN DE WATER, concurring:

While I concur, albeit reluctantly, in my colleagues' finding that Respondent did make a 3-year commitment to make payments into health, welfare, and pension funds, I am increasingly concerned that the Board's already overtaxed processes are being utilized to interpret and enforce contracts when other forums are available to the parties. Both state and Federal courts are available to interpret and enforce existing contracts. As long ago as 1955, the Board took the position in United Telephone Company of the West and United Utilities Incorporated, 112 NLRB 779 at 781, that it was not in the business of interpreting contracts. Some of the comments in that decision are still relevant today. In that decision the Board noted (112 NLRB at 781):

> The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations.
>
> Further on, the Board went on to state:
>
> Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years with the approval of the courts: ''. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.''[2]

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[2] Consolidated Aircraft Corporation, 47 NLRB 694, enfd. 141 F.2d 364 (C.A. 9). See also Crown Zellerbach Corporation, 95 NLRB 753.

The Board went on to dismiss the 8(a)(5) allegation noting at page 782 that the ''Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.''

Obviously such a policy approach has been seriously eroded in the years since then. In view of the Board's increasing backlog due in part to inflation and frozen jurisdictional standards since 1959, I believe it more important for this Agency to promptly resolve cases involving more serious policy questions and important representation issues. Therefore, it is time for this Board to revert to the principles earlier announced and to decline jurisdiction over cases involving purely contract interpretation unless a serious statutory issue is involved.

Dated, Washington, D.C.

August 30, 1982

John R. Van de Water,
Chairman

NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union representatives of their own choice
To bargain collectively through represenatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fail or refuse to make contributions to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of our collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which contract covers the employees in the following appropriate unit:

All full-time and regular part-time truck drivers, and yard employees employed by Capitol City Lumber Company at or out of our facility located at 700 E. Kalamazoo St., Lansing,

Michigan, but excluding all sales employees, office clerical employees, and casual employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make the contributions which we failed to remit to the Michigan Conference of Teamsters Welfare Fund and the Central States Southeast and Southwest Areas Pension Fund for the 3-year period as set forth in article XIX of our collective-bargaining agreement with Local No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for the employees in the above-mentioned unit.

WE WILL, in the event that either fund has canceled coverage, reimburse unit employees, with interest, for any loss of claims and benefits they may have suffered as a result of such cancellation.

CAPITOL CITY LUMBER COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

APPENDIX C

DECISION OF COURT OF APPEALS

Nos. 82-1682, 82-1850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAPITOL CITY
LUMBER COMPANY,

Petitioner,

v.

NATIONAL LABOR
RELATIONS BOARD,

Respondent.

ON PETITION for Review of an Order of the National Labor Relations Board.

Decided and Filed November 11, 1983

Before: MARTIN and CONTIE, Circuit Judges; and PHILIPS, Senior Circuit Judge.

PER CURIAM. Capitol City Lumber Company petitions for review of an order

of the National Labor Relations Board requiring Capitol City to make certain payments into pension and welfare benefit funds maintained for the benefit of its employees, members of Teamsters Union, Local 580. 263 N.L.R.B. 102. The Board, in turn, cross-applies for enforcement of its order pursuant to 29 U.S.C. § 160(e).

In the spring of 1979, Capitol City and Local 580 entered into negotiations for a new contract covering the company's employees. On May 25, the company and the union reached agreement on the terms of that contract. The new contract was to e effective for one year, beginning May 1, 1979, and would be automatically renewed each year unless either party gave notice sixty days prior to the renewal date. Article XIX of the agreement, however, committed the company to making contributions to the employee pension and

welfare benefit funds for a three-year period.[1]

The employees ratified the new agreement immediately but the contract was not submitted to the company president, Olson, for signature until December 14, 1979, because of Olson's ill health. At that time, Olson expressed misgivings about making a three-year commitment to the pension and welfare funds in what was otherwise a one-year renewable contract.

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[1]Article XIX of the contract provided, in relevant part, that the Company would make the following contributions to the funds per week for each employee:

WELFARE FUND

$25 effective May 1, 1979
$28 effective April 1, 1980
$31 effective April 1, 1981

PENSION FUND

$21 effective May 1, 1979
$24 effective May 1, 1980
$31 effective May 1, 1981

Olson was also concerned that his employees did not appreciate the cost implications of the Company's fund contributions. The union representative, Mr. Cooper, explained that a three-year commitment was necessary to meet the participation requirements of the funds' managers. Cooper agreed to draw up an additional letter of understanding to clarify the situation.[2] The resulting letter confirmed

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[2]The letter of understanding reads in its entirety as follows:

> In the May 1, 1979 contract negotiations in order to remain with the Michigan Conference of Teamsters Welfare Fund UE Plan, and Central States Southeast and Southwest Areas Pension Plan, a thirty-six (36) month commitment was required due to plan regulations.
>
> The money package negotiated was sixty-seven and one half cents (67 1/2) per hour providing forty-five cents (45 cents) per hour applied to wages and the remaining twenty-two and one half cents (22 1/2) per hour applied as contributions to maintain the Health and Welfare and Pension Plans from

that a three-year commitment was required to participate in the funds. The letter also spelled out the per-employee cost for the company's first-year contributions to the funds and stated that future wage agreements must take into account the cost of fund payments. This letter of understanding was incorporated into the separate fund participation agreements, and they, along with the collective bargaining agreement itself, were signed by Olson and Cooper on December 30, 1979.

The collective bargaining agreement was renewed May 1, 1980 for another year. However, the company did not increase its payments to the welfare and pension funds

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(cont.)
May 1, 1979 through April 30, 1980.

In order to maintain the Health and Welfare and Pension plans from May 1, 1980 it will be necessary to deduct the cost from the money negotiated in future negotiations.

as called for in Article XIX of the collective bargaining agreement but kept them at the previous year's level. The agreement was not renewed on May 1, 1981, and the company ceased making contributions to the funds altogether. The union filed an unfair labor practice charge, claiming that the company had violated sections 8(a)(5) and (1) of the Act by failing to make contributions to the funds as required by the agreement. The administrative law judge, upheld by the Board, found a violation and ordered the company to remit to the funds all amounts required by Article XIX for the three-year period from May 1, 1979 to April 30, 1982. We agree.

The company's first allegation on review is that the Board lacked jurisdiction to hear the union's complaint. The Board's jurisdiction is limited to resolving disputes involving unfair labor

practices. Section 10(a) of the Act, 29 U.S.C. § 160 (a). The Board does not have the authority to police collective bargaining agreements. NLRB v C & C Plywood Corp., 385 U.S. 421, 427-28 (1967). Here, the company argues that the union alleges nothing more than a violation of a collective bargaining agreement, and, therefore, the union's remedies are limited to the grievance procedure established by the agreement or a breach of contract suit in the courts. However, it is well established that the Board does have jurisdiction to resolve contractual disputes, including those involving a collective bargaining agreement, whenever those disputes are central to the disposition of an unfair labor practice complaint. Id. Here, the unfair labor practice is the company's failure to bargain over changes in the terms and

conditions of employment--the reductions in payments to the pension and welfare funds--in violation of sections 8(a)(5) and (1) of the Act. See Malone v White Motor Corp., 435 U.S. 497, 504 (1978). Because the contractual violation is identical to the unfair labor practice, the Board has jurisdiction to decide both.

The Supreme Court has already upheld the Board's jurisdiction in a very similar case, NLRB v C & C Plywood, supra. There, the company attempted to raise the wages of certain workers without consulting the union and in violation of the wage scale established in the collective bargaining agreement. Capitol City attempts to distinguish this case on two grounds: (1) the bargaining agreement in C & C Plywood had no arbitration provision, and (2) unllike the present case, there was no adequate remedy available to the union by

suit in federal or state court. The subsequent case of NLRB v Strong, 393 U.S. 357, 361 (1969), however, clearly refutes both arguments. In Strong, the court said:

> [T]he Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. [citations omitted.]

Finally, the Company argues that the Board's interpretation of the case law would convert any violation of the collective bargaining agreement into an unfair labor practice and thereby allow the Board to police collective bargaining agreements, a practice which the Congress has expressly refused to sanction. The company's fears are not well founded. Most disputes over interpretation of collective bargaining agreements, such as the termination of an employee in alleged

violation of a "just cause" discharge requirement, simply do not rise to the level of an unfair labor practice. Moreover, even those violations of an agreement which could be characterized as unfair labor practices are usually resolved in the arbitration/grievance procedure established by that agreement. The Board has a long history of deferring to the arbitration process both before and after an arbitration award has been made. See Speilberg Mfg. Co., 112 N.L.R.B. 1080 (1955); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). However, the Board has made it clear that when, as here, the arbitral machinery is no longer available to resolve a dispute because the time limit for filing a grievance has expired and the adverse party will not waive the timely filing requirement, it will assert its jurisdiction. Detroit Edison Co., 206

N.L.R.B. 898 (1973). Capitol City has little cause to complain when its own actions are responsible for the failure of the arbitration procedure.

Moving to the merits of the case, the company argues that the Board's interpretation of the letter of understanding is not supported by substantial evidence because the Board failed to follow the maxim that an ambiguous contract is construed most strongly against the party who drafted it. Had the Board done this, argues the company, it would have been forced to credit the testimony of president Olson that the letter was intended to limit to one year the company's commitment to the pension and welfare funds. We disagree. This maxim is a strategy of last resort to be used only after all other interpretative guides have been exhausted and ambiguity still remains.

No such impasse was reached in this case. The Board, relying on the principle that parts of the same contract are to be construed so as to be consistent with each other, found that the letter of understanding was a response to Olson's concern that the employees understand the costs of the settlement and not an attempt to alter the company's three-year commitment to the funds. There is substantial evidence in the record to support this finding, including the testimony of Cooper, the union representative, and we will not disturb it.

Finally, the company argues that the remedy which the Board ordered was too broad. The Board required the company to remit to the pension and welfare funds all amounts due according to Article XIX from May 1, 1979 to April 30, 1982. The company argues that since there was no contract in

effect between the parties for the last year, the Board had no authority to order it to make contributions to the funds. The company's argument is without merit. While the rest of the collective bargaining agreement expired on April 30, 1981, the commitment to the funds remained in effect. Therefore, the company owed back payments to the funds and the Board was empowered to order them paid.

Accordingly, the order of the Board is enforced.